

No. 13,729

IN THE

United States Court of Appeals
For the Ninth Circuit

GEORGE FRENCH, JR., and MARY E. FRENCH,
Appellants,

VS.

HAROLD A. BERLINER, Former Collector of
Internal Revenue,
Appellee.

On Appeal from the United States District Court
for the Northern District of California.

SUPPLEMENTAL MEMORANDUM FOR THE APPELLEE.

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SUPPLEMENTAL MEMORANDUM FOR THE APPELLEE.

The original complaints in this proceeding (R. 3-7, 11-15) were filed on December 9, 1949 (R. 10, 18), against James G. Smyth, who was then Collector of Internal Revenue for the First District of California, to recover judgments in the respective amounts of \$32,718.59 and \$32,717.65, which amounts the taxpayers had theretofore paid to Collector Smyth in 1946 and 1947 as additional federal income taxes and interest assessed against them by the Commissioner of Internal Revenue for the taxable year 1943. The complaints were based upon claims for refund in

those amounts which the taxpayers had filed on December 28, 1948 (R. 7-10, 15-18, 78), and which had been finally disallowed by the Commissioner on November 7, 1949 (R. 80).

After the entry of judgment in both cases by the Court below in favor of Collector Smyth on a special verdict of a jury (R. 25-27) the Court granted a new trial (R. 29), and gave taxpayers leave to file amended complaints (R. 33).

Amended complaints (R. 34-44) were filed by the taxpayers on December 20, 1951 (R. 39, 44). By their amended complaints, the taxpayers sought the same recoveries against Collector Smyth, but by amendment, Harold A. Berliner, a former Collector of Internal Revenue, was made a party defendant, and recovery was sought against the latter in the respective amounts of \$19,611.20 and \$19,611.21.

On the second trial the Court below gave taxpayers judgment against Collector Smyth in the respective amounts of \$32,718.59 and \$32,578.28, with interest (R. 83-84), but denied judgment against former Collector Berliner. No appeal was taken from the judgment against Collector Smyth, but the taxpayers have appealed from that part of the judgment denying any recovery against former Collector Berliner (R. 85), and the only issue before this Court is the correctness of that part of the judgment below.

In a lengthy opinion filed on October 14, 1952 (R. 56-70), the Court below held that recovery could not be had against former Collector Berliner because the

ground on which recovery is sought against him had not been set forth in the taxpayers' refund claims.

The brief filed in this Court on behalf of former Collector Berliner is directed to supporting the judgment below, as to Berliner, on the ground approved by the District Court. However, at the argument of the appeal before this Court counsel for the Collector suggested that the judgment below may also be affirmed on the further ground that any recovery against former Collector Berliner is barred by the statute of limitations, and counsel were requested to submit memoranda directed to this issue.

It is axiomatic that the Government can be sued only with its consent, and subject to such conditions and limitations as Congress may prescribe. The timely filing of a proper claim for refund and the timeliness of the suit are among the conditions upon which the Government has consented to be sued for the recovery of internal revenue taxes erroneously or illegally collected, and are jurisdictional. *United States v. Chicago Golf Club*, 84 F. 2d 914, 917 (C.A. 7th); *Alexander Smith & Sons C. Co. v. Commissioner*, 117 F. 2d 974, 975 (C.A. 2d); *Vica Co. v. Commissioner*, 159 F. 2d 148 (C.A. 9th); *Edwards v. United States*, 163 F. 2d 268 (C.A. 9th).¹

¹Compare *Routzahn v. Reeves Bros. Co.*, 59 F. 2d 915 (C.A. 6th), certiorari denied, 287 U.S. 650; *United States v. Reeves Bros. Co.*, 83 F. 2d 121 (C.A. 6th), certiorari denied, 299 U.S. 573, rehearing denied, 301 U.S. 713; *A. G. Reeves Steel Const. Co. v. Weiss*, 119 F. 2d 472 (C.A. 6th), certiorari denied, 314 U.S. 677; *Roles v. Earle*, 195 F. 2d 346 (C.A. 9th), certiorari denied, 344 U.S. 819.

At the time of the argument it was suggested by counsel for the Collector that on the face of the record it appears that any recovery in this action against former Collector Berliner is barred, both as to the timeliness of the refund claims on which these suits are based to cover any part of the original 1943 taxes paid to Berliner, and also as to the timeliness of the suits against him. The District Court found (R. 78, Finding 12) that the claims filed on December 28, 1948, were timely as to the additional taxes and interest paid to Collector Smyth, for which he gave judgment, but the finding does not purport to apply to the original 1943 taxes paid to former Collector Berliner in 1943, refund of which would have been barred under Section 322(b)(1) and (2) of the Internal Revenue Code of 1939 at the time the refund claims were filed unless waivers had been executed which would have the effect of extending the time to the date of filing as provided in paragraph (3) of Section 322(b). See *Jones v. Liberty Glass Co.*, 332 U.S. 524. While the record is not clear on this point, taxpayers' Exhibit 5, introduced at the first trial but not printed in the record, purports to be such a waiver, executed under date of November 19, 1946, which would have the effect of extending to December 31, 1948, the time for filing a claim for refund of the original tax paid in 1943.

However, the claims here involved were only for refund of the additional 1943 taxes and interest paid to Collector Smyth in 1946 and 1947. They do not purport to claim a refund of any part of the taxes

paid to his predecessor in office. The taxpayers could not recover in their actions against Collector Smyth any part of the taxes paid to his predecessor in office. *Smietanka v. Indiana Steel Co.*, 257 U.S. 1; *Union Trust Co. v. Wardell*, 258 U.S. 537; *Levy v. Wardell*, 258 U.S. 542; *United States v. Reeves Bros. Co.*, 83 F. 2d 121 (C.A. 6th), certiorari denied, 299 U.S. 573, rehearing denied, 301 U.S. 713; *Brauch v. Birmingham*, 49 F. Supp. 229 (N.D. Iowa). Therefore, if any overplus resulted in their favor from a favorable determination of the issues presented by their refund claims and their suits against Collector Smyth the taxpayers would be left without remedy as to such overplus. That, apparently, was their reason for amending their complaints and naming former Collector Berliner a new party defendant, because no new issue of fact or law seems to have been raised by the amended complaints, whether warranted by their refund claims or not.

However, regardless of whether the taxpayers have overpaid their original 1943 taxes in the amounts claimed, we submit the record clearly shows on its face any recovery of such amounts from former Collector Berliner is barred because the suit against him was not brought within the time required by Section 3772(a) of the Internal Revenue Code of 1939, which reads in material part as follows:²

²While it was not raised or passed upon by the court below, it seems settled that in suits against the United States (and we see no basis for differentiation in this respect between such suits and suits against collectors of Internal Revenue for the recovery of taxes), the question of the timeliness of the suit, being jurisdic-

Sec. 3772. Suits for Refund.

(a) *Limitations.*—

(1) *Claim.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations * * * established in pursuance thereof.

(2) *Time.*—No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, *nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which*

tional, can be urged as a defense whenever it appears from the face of the record that the action was barred when brought, and the Government cannot be estopped by pleadings from relying on the statute of limitations. *Finn v. United States*, 123 U.S. 227, 232-233; *Carpenter v. United States*, 56 F. 2d 828, 829 (C.A. 2d); *Pacific Mills v. Nichols*, 72 F. 2d 103, 105 (C.A. 1st); *Gans S. S. Line v. United States*, 105 F. 2d 955, 957 (C.A. 2d), certiorari denied, 308 U.S. 613, rehearing denied, 310 U.S. 658; *A. G. Reeves Steel Const. Co. v. Weiss*, 119 F. 2d 472, 476 (C.A. 6th), certiorari denied, 314 U.S. 677; *De Bonis v. United States*, 103 F. Supp. 119, 122-123, 126 (W.D. Pa.). Also, on the right of an appellee to urge matter appearing in the record in support of the judgment below, see *Helvering v. Gowran*, 302 U.S. 238, 245-246, and cases cited, rehearing denied, 302 U.S. 781; *Le Tulle v. Scofield*, 308 U.S. 415.

such suit or proceeding relates. (Italics supplied.)

* * * * *

(26 U.S.C. 1952 ed., Sec. 3772.)

The refund claims on which the suits here involved are based were disallowed by the Commissioner on November 7, 1949. (R. 6, 14, 21, 24, 38, 43, 46-47, 49, 80.) The amended complaints, for the first time naming former Collector Berliner as a defendant and seeking recovery of a part of the original 1943 taxes paid to him in 1943, were filed on December 20, 1951 (R. 39, 44), which was after the two-year period prescribed by Section 3772(a)(2) of the 1939 Code had expired.³

In calling attention to the fact that suit against former Collector Berliner was barred at the time the amended complaints naming him as a defendant were filed it is in no way suggested that the trial Court cannot, within a reasonable exercise of its discretion, grant leave to amend, even after the time for instituting suit has expired—as was the case here, the order granting leave to amend having been entered on December 13, 1951 (R. 33)—or after the period for

³The only exception to the two-year limitation period prescribed by Section 3772(a)(2) is that contained in Section 3774(b)(2) of the 1939 Code, made applicable by Section 3772(a)(3)(B), clearly not applicable here, in the case of an agreement to that effect entered into by the taxpayer and the Commissioner. Also, the general six-year period provided by 28 U.S.C., Section 2401 (formerly Section 24, Twentieth, of the Judicial Code), does not apply to suits based on claims for refund of internal revenue taxes. See *United States v. A. S. Kreider Co.*, 313 U.S. 443.

filing suit on the rejected claims had expired.⁴ Rather, the suggestion of the bar of the statute of limitations is based on the fact that the action against Berliner, although asserted in an amended complaint, is a new action as to him, and regardless of any merit as to the taxpayers' claim to having overpaid a portion of their original 1943 taxes, the right to proceed against Berliner for their recovery had expired two years after the rejection of their refund claims.⁵ The situation here, so far as Berliner is concerned, is not materially different from that in *Third Nat. Bank & Trust Co. v. White*, 58 F. 2d 411 (Mass.), where suit was timely brought against a successor in office and later, by amendment, the predecessor in office to whom the taxes were paid was substituted as party defendant after the two-year period had expired and the Court properly held that the substitution of the new defendant by amendment constituted the beginning of a new action so far as the substituted defendant was concerned. To the same effect, but more interesting, is *Toledo Rys. & Light Co. v. McMaken*,

⁴In a similar situation the District Court of Maryland, in *State of Maryland v. Manor Real Estate & Trust Co.*, 83 F. Supp. 91, 94, affirmed in part and reversed in part on other grounds, 176 F. 2d 414 (C.A. 4th), arising under the Federal Tort Claims Act, refused leave to amend to add a new party defendant after the statute of limitations had run as to that defendant. See, also, *Phoenix State Bank & Trust Co. v. Bitgood*, 28 F. Supp. 899 (Conn.), where the trial court refused to substitute the United States as a party defendant after the period for bringing suit had expired.

⁵At all times material here former Collector Berliner was no longer in office; and by reason of the provisions of 28 U.S.C., Section 1346, the United States could have been made a party defendant instead of Berliner when the amended complaints were filed, but the result would have been the same.

17 F. Supp. 338 (N.D. Ohio), affirmed, *sub nom. Toledo Edison Co. v. McMaken*, 103 F. 2d 72 (C.A. 6th), certiorari denied, 308 U.S. 569, involving a suit brought against the proper Collector in 1912, with a later substitution of his successor in office, followed by voluntary reinstatement of the original Collector, then his personal representatives, after the time for suit against the original Collector had expired. See, also, *Mellon v. Weiss*, 270 U.S. 565; *Sweeney v. Greenwood Index-Journal Co.*, 37 F. Supp. 484, 487 (W.D. S.C.); *Royal Worcester Corset Co. v. White*, 40 F. Supp. 267 (Mass.); *Phoenix State Bank & Trust Co. v. Bitgood*, 28 F. Supp. 899 (Conn.).

While the above cases, and many others which could be cited to the same effect, involve substitution rather than addition of parties defendant we find no basis for differentiation. The present actions were timely as to Collector Smyth and the amounts paid to him, and the taxpayers have recovered judgments against him accordingly. But the amended complaints had no curative effect as to former Collector Berliner; the amended complaints constituted the beginning of a new action, personal as to him,⁶ which the Court below held was based upon a ground not covered by their refund claims, and which the amended complaint, on its face clearly shows was brought after the two-year statute of limitations prescribed by Section 3772(a) of the 1939 Code had expired. It is an

⁶*Sage v. United States*, 250 U.S. 33; *Smietanka v. Indiana Steel Co.*, 257 U.S. 1; *United States v. Nunnally Investment Co.*, 316 U.S. 258; *Brauch v. Birmingham*, 49 F. Supp. 229 (N.D. Iowa).

action for the recovery of taxes paid to Berliner, and is not covered by an action against Collector Smyth. The action against former Collector Berliner, not being timely, should have been dismissed. Compare *Smallwood v. Gallardo*, 275 U.S. 56.

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